No. 92-1772

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

BROUGHTON LUMBER CO.,

Petitioner,

v.

COLUMBIA RIVER GORGE COMMISSION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Absent Eleventh Amendment concerns, does 28 U.S.C. §1331 confer federal court jurisdiction over regulatory takings disputes involving interstate compact agencies?

2. Do the jurisdictional provisions of the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §544m(b)(4)-(6), confer federal subject matter jurisdiction over actions against the Columbia River Gorge Commission?

PARTIES TO THE PROCEEDING

Petitioner is Broughton Lumber Co., a Washington corporation. Petitioner has no corporate parent or subsidiaries.

Respondent is the Columbia River Gorge Commission, an interstate compact agency authorized by Congress and by the states of Oregon and Washington.

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BROUGHTON LUMBER CO.,

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Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petitioner Broughton Lumber Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case for review in that court.

OPINIONS BELOW

The Ninth Circuit's opinion as amended is reported at 975 F.2d 616 (9th Cir. 1992) and is reprinted at page A-1. The Ninth Circuit's original opinion is reprinted at A-22.

The district court's order adopting the magistrate's Findings and Recommendations granting respondent Columbia River Gorge Commission's motion to dismiss plaintiff's declaratory judgment claim, and remanding plaintiff's inverse condemnation claim against the Commission for further consideration is set out at A-40. The district court's order adopting on other grounds the magistrate's recommendation that the inverse condemnation claim against the Commission be dismissed is set out at A-42.

The order of the Commission's Executive Director denying petitioner's land use proposal and the

Commission's final order adopting its Executive Director's findings of fact and conclusions of law are set out at A-46 and A-48.

JURISDICTION

The court of appeals filed its original opinion on September 15, 1992. Petitioner timely filed a petition for rehearing on September 28, 1992. On December 2, 1992, the court of appeals filed an amended opinion without acting upon the petition for rehearing. Out of an abundance of caution, petitioner timely filed on December 16, 1992 a petition seeking rehearing of the amended opinion. On January 22, 1993, the court of appeals denied "the petition for rehearing," but did not indicate which of the two petitions was denied. On February 5, 1993, the court issued its mandate. This writ is filed within 90 days after January 22, 1993, and is timely

under Rule 13. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Two provisions of the United States Constitution are involved in this case, Article I's compact clause and the Fifth Amendment's takings clause. The compact clause reads in pertinent part: "No state shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State." U.S. Const. art. 1, §10, cl. 3. The takings clause reads: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Four legislative acts are involved in this case, two federal and two state. The federal acts involved are the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§544-544p (1992), and the federal question jurisdiction statute, 28 U.S.C. §1331 (1992). The two state

acts involved are the statutes passed by the legislative assemblies of Oregon and Washington that created the Columbia River Gorge Compact. See Or. Rev. Stat. §§196.150-.165 (1991) and Rev. Wash. Code §§43.97.015-.035 (1992). Pertinent provisions of the federal and state statutes are set out beginning at A-61.

STATEMENT OF THE CASE

A. Introduction.

Without hyperbole, the Columbia River Gorge National Scenic Area Act can be characterized as the most complex exercise in federalism in U.S. history. Within a 292,000-acre stretch of the Columbia River Gorge in Oregon and Washington, the federal government and a bi-state Commission have displaced six counties as the regulators of all land use.

Under the statutory scheme, the U.S. Forest Service in 1987 promulgated interim land use regulations that are

still in place and are administered by the Gorge Commission. The result is a land use regime that originates with federal drafters, but is applied by an interstate commission with far-reaching zoning authority but no power to compensate private landowners for regulatory takings. Ultimately, the Gorge Act contemplates that the Forest Service will develop half of the Scenic Area's land use designations, the Gorge Commission will prepare the other half, and then both halves will be adopted and administered by the Gorge Commission (or any county that elects to adopt ordinances in strict compliance with the Forest Service/Gorge Commission-authored regulations).[1]

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[1] The Forest Service is required to draft the land use regulations for all public and private lands in the 115,000-acre special management area; the Gorge Commission has the same responsibility for the 149,000-acre general management area. The Gorge Commission must then accept the Forest Service designations without change and combine both halves into a management plan for the entire Scenic Area. 16 U.S.C. § 554f(a)(1)(f) and § 544d(c).

Thus, the Gorge Act embodies a "new wave" approach to resource preservation that employs intensive interstate regulation of private property rather than the traditional national park or national recreation area "acquisition" model. Indeed, the Gorge Act's regulatory thrust is being touted as a model for the preservation of other natural areas in the United States, including Jackson Hole, Big Sur, Napa Valley, Connecticut River Valley, Hudson River Valley, the Appalachicola River and Bay, the Mobile-Tensaw River Bottom Lands and the Greater Everglades Ecosystem.[2]

If these federally conditioned interstate arrangements are to function effectively and coherently, disputes regarding compact agencies' authority must be subject to federal judicial review. Otherwise, compact

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[2] See The Oregonian, November 24, 1986, at 1, column 2.

agencies will be subjected to the conflicting and potentially irreconcilable directives of the courts of the participating states. Because Congress recognized this need for uniformity in expressly conferring federal jurisdiction under the Gorge Act, and because federal question jurisdiction applies in any event, the Ninth Circuit's analysis and decision must be corrected.

B. The Gorge Act and Interstate Compact.

In November 1986, Congress enacted the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§544-544p. Under the Gorge Act, Congress authorized Oregon and Washington to enter into an interstate compact to regulate land use in specified areas of six Oregon and Washington counties which border the Columbia River for 83 miles.

The Gorge Act, and its implementing interstate compact, are similar to other regional resource

management mechanisms which have proliferated in recent years. See, e.g., Pacific Northwest Electric Power and Conservation Council, consented to by Congress, 16 U.S.C. §§839 et seq. (1982); Tahoe Regional Planning Compact, consented to by Congress, Pub. Law 91-148, 83 Stat. 360 (1969); Delaware River Basin Compact, consented to by Congress, Pub. Law 87-328, 75 Stat. 688 (1961). While the details vary, the basics are constant. In each instance, Congress has sanctioned the creation of a largely autonomous entity, neither "federal" nor "state," to engage in sweeping regulation and allocation of multistate resources.

Congress based its consent to the Oregon/Washington interstate compact on a variety of conditions. Pursuant to these conditions, Oregon and Washington each expressly incorporated the Gorge Act into

its compact legislation. See Or. Rev. Stat. §196.150 (1991); Rev. Wash. Code §43.97.015 (1992).

Also pursuant to these congressional conditions, the states established and empowered an interstate compact agency, the Columbia River Gorge Commission, to oversee the development of land-use planning in the bi-state Gorge Scenic Area. The Gorge Commission was, and is, further empowered to enforce such land-use restrictions. 16 U.S.C. § 544m(b)(1)(B).

In 1987, the Gorge Commission and the Secretary of Agriculture developed interim regulations governing land use in the Gorge Scenic Area. Those regulations, which are still in effect, have severely restricted land use in the Scenic Area, depriving many landowners of all economically viable use of their property.

In August 1988, petitioner Broughton Lumber Co. submitted a land use application to the Gorge

Commission to subdivide 108.53 acres which Broughton owns in the Scenic Area into three parcels for residential development. In January 1989, the Gorge Commission rejected this proposal. A-46.

Broughton then sued the Commission, Oregon, and Washington in the United States District Court for the District of Oregon. Broughton sought declaratory relief against the Commission and further, in the alternative, asserted an inverse condemnation claim against both states and the Commission.

In particular, Broughton sought a declaration that the Gorge Commission's denial of its application violated both the express conditions Congress placed on the interstate compact and the regulations promulgated under the compact. Alternatively, if the Commission's actions were determined to be lawful, Broughton alleged that those actions effected an uncompensated "taking." A-35.

The district court: (1) dismissed Broughton's claim for declaratory relief against the Commission, holding that the Gorge Act precluded federal jurisdiction over claims against the Commission; (2) dismissed Broughton's inverse condemnation claim against Oregon and Washington on Eleventh Amendment grounds; and (3) dismissed Broughton's inverse condemnation claim against the Commission as "unripe." A-35, 40 and 42.

The Ninth Circuit affirmed. A-1, 22.

Broughton now seeks review of the lower courts' holding that the district court lacked jurisdiction, including pursuant to 28 U.S.C. §1331, to consider Broughton's claim for declaratory relief against the respondent Gorge Commission.

REASONS FOR GRANTING WRIT

This case presents novel and important issues concerning the susceptibility of congressionally-authorized interstate compact agencies to federal jurisdiction. Given the proliferation of such agencies as a device for regional management of natural resources, these issues are increasingly important, particularly for citizens of the West.

Beyond the interstate compact-related issues, review is imperative to reiterate the proper scope of 28 U.S.C. §1331. The lower courts' "repeal by implication" treatment of federal question jurisdiction in this case contradicts this Court's consistent precedents that any abrogation of federal court jurisdiction must be express, not implied.

Finally, the proper construction of the Columbia River Gorge National Scenic Area Act itself is of

vital importance to thousands of citizens who reside and own property in the Scenic Area. Unless the Gorge Act is properly construed to afford uniform federal court review of Gorge Commission decisions, those citizens will be left without meaningful judicial review and remedies.

I. Disputes Concerning the Authority of Interstate Compact Agencies Are Subject to Federal Question Jurisdiction.

The Columbia River Gorge Commission, like any interstate compact agency, is an entity sanctioned by act of Congress. 16 U.S.C. §§544-544p. The Commission's raison d'etre is to implement the directives of omnibus federal legislation, the Columbia River Gorge National Scenic Area Act.

Nonetheless, the Ninth Circuit concluded that disputes involving the Gorge Commission's authority are not subject to federal court jurisdiction, specifically

including federal question jurisdiction. That conclusion must be corrected for two reasons:

First, given the nature and function of interstate compact agencies, such agencies must be subject to federal question jurisdiction unless Congress, in the enabling legislation, expressly abrogates such jurisdiction.

Second, in authorizing the creation of the Gorge Commission, Congress, rather than expressly abrogating federal court jurisdiction, explicitly provided for such jurisdiction over disputes involving the Commission. See 16 U.S.C. §544m(b)(4), discussed at pp. 20-24, infra. Indeed, any abrogation of federal jurisdiction would have frustrated the efficient interstate administration of the Gorge Act.

This Court has consistently held that where federal jurisdiction would otherwise apply, "repeal" of that jurisdiction must be explicit. Rosencrans v. United States,

165 U.S. 257 (1897), which involved criminal jurisdiction, described this principle:

> When there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, where Congress has expressly legislated in respect to a given matter, that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation.

165 U.S. at 262.

Applying this principle, this Court in Colorado River Water Cons. Dist. v. United States, 424 U.S. 800 (1975), determined that the McCarran Amendment did not repeal federal court jurisdiction to entertain federal water suits, including under 28 U.S.C. §1331:

> In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by

> implication is when earlier and later statutes are irreconcilable.

424 U.S. at 808 (construing McCarran Amendment to permit concurrent federal/state jurisdiction over such disputes).

Conversely, Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1937), and Weinberger v. Salfi, 422 U.S. 749 (1975) exemplify the sort of express congressional language this Court requires to abrogate federal question jurisdiction. In E.G. Shinner & Co., the operative statute declared, "No court of the United States shall have jurisdiction . . . ." 303 U.S. at 329. In Salfi, the operative language directed, "No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [§§1331 et seq.]." 422 U.S. at 746.[3]

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[3] Cf. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (finding abrogation of federal question jurisdiction pursuant to Foreign Sovereign Immunities Act; relying, in part, on legislative history

Here, Congress, far from expressly "repealing" federal question jurisdiction over the Gorge Commission, explicitly provided for such jurisdiction. See pp. 20-24, infra. Indeed, the availability of federal judicial review, and concomitant uniformity, is imperative if the Gorge Commission--or any interstate compact agency--is to function responsibly.

The essence of an interstate compact is interstate consistency. Only federal judicial review can assure such consistency.

In this case, the Gorge Act's predominant purpose is to promote uniform protection for both the economy and the scenic, cultural, recreational, and natural resources of the bi-state Columbia Gorge Area. If, however, disputes regarding the Gorge Commission's

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establishing clear congressional intent to effect such a "repeal" of federal jurisdiction).

authority could be adjudicated only in the state courts of Oregon and Washington, the fundamental goal of interstate uniformity would be frustrated. The Commission would be subject to the competing, inconsistent, and perhaps inevitably irreconcilable mandates of the courts of two co-equal sovereigns. See generally Nevada v. Hall, 440 U.S. 410, 432-43 (1979) (Rehnquist, J., dissenting).

Nor are these concerns unique to the Gorge Commission. Interstate compacts are an increasingly favored mechanism for regional environmental and resource management. See, e.g., Nicholas A. Robinson, Environmental Regulation of Real Property §18.02 (1991); Frederick L. Zimmerman and Mitchell Wendell, The Law and Use of Interstate Compacts, ix, 102-109 (1976). The need for uniformity increases exponentially as the participants in such multistate arrangements double, and redouble.

Federal question jurisdiction assures that uniformity.[4] Because Congress recognized that reality, and the Ninth Circuit did not, review is imperative.

II. The Columbia River Gorge National Scenic Area Act Expressly Confers and Confirms Federal Court Jurisdiction Over Disputes Concerning the Gorge Commission's Authority.

The linchpin to the Ninth Circuit's analysis is its conclusion that certain provisions of the Gorge Act, 16 U.S.C. §544m(5) and (6), confer exclusive jurisdiction in the courts of Oregon and Washington to adjudicate disputes involving the Gorge Commission. See A-13 to 18.

This analysis ignores--indeed, reads out of the Gorge Act--16 U.S.C. §544m(b)(4):

> Any person or entity adversely affected by--

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[4] See Comment, "Federal Question Jurisdiction to Interpret Interstate Compacts," 64 Geo. L. J. 87 (1975).

* * *

> (B) any land use ordinance or interim guideline adopted pursuant to this act;
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> (C) any appeal to the Commission pursuant to this section;
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> * * *
>
> may appeal such action or order by filing in any of the courts specified in paragraph (5) . . . .

The "courts specified in paragraph (5)" are the United States district courts located in the states of Oregon and Washington. See 16 U.S.C. §544m(b)(5).[5]

Broughton was "adversely affected" by the Commission's denial of Broughton's appeal from the Executive Director's rejection of its land use application pursuant to 16 U.S.C. §544m. Consequently, pursuant to

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[5] The complete text of 16 U.S.C. §544m(b)(4), (5) and (6) is set out at A-70 to 76.

§544m(b)(4), Broughton was entitled to pursue its declaratory judgment action in district court seeking review of the Commission's adverse action.

The Ninth Circuit's conclusion to the contrary cannot be squared with §544m(b)(4). Because any reasonable construction of §544m(b)(4) compels jurisdiction, the Ninth Circuit's decision is sensible only if that provision is ignored.

Significantly, neither the Ninth Circuit nor the respondent Commission has ever offered a plausible construction of §544m(b)(4) that would give that provision substance without conferring federal jurisdiction.

The Ninth Circuit's "judicial expungement" of §544m(b)(4) violates this Court's canon that jurisdictional statutes must be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes." Palmore v. United States, 411 U.S. 389, 396

(1973) (quoting Cheng Fan Kwok v. INS, 392 U.S. 206, 212 (1968)). Most recently, in Port Auth. Trans-Hudson v. Feeney, 495 U.S. 299, (1990) this Court reiterated this principle in rejecting the suggestion that the venue provision of an interstate compact should be given no meaning and ignored:

> Petitioner essentially presents the choice between giving the venue provision its natural meaning and giving the provision no meaning at all. Charged with giving effect to the statute, we do not find the choice to be a difficult one.

499 U.S. at 308.

Section 544m(b)(4) has only one "natural meaning." That statute expresses Congress' determination to promote the policy of interstate uniformity by explicitly identifying the federal courts as an appropriate form for

resolving Commission-related disputes.[6] If the Gorge Act is to be coherent, that intent must be given effect.

CONCLUSION

The Ninth Circuit's decision incorrectly analyzes and resolves exceptionally important questions of federal jurisdiction over interstate compact agencies.

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[6] Accord Goble, "The Compact Clause and Transboundary Problems: 'A Federal Remedy for the Disease Most Incident to a Federal Government,'" 17 Envtl. L. 785, 791 (1987) (Gorge Act "expressly confer[s] jurisdiction on the federal courts to resolve disputes concerning compact provisions").

Petitioner respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted this 22nd day of April, 1993.

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